

Supreme Court Copy

Supreme Court No. S179194
WCAB Case No.: ADJ1510738/SJO 0251902
Sixth App. Dist.No. H034040

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN C. DUNCAN, DIRECTOR of)
INDUSTRIAL RELATIONS, as)
ADMINISTRATOR ~~of the etc.,~~)
~~SUBSEQUENT INJURIES BENEFITS~~)
~~TRUST FUND of the STATE OF~~)
~~CALIFORNIA~~)

Petitioner,)

v.)

THE WORKERS' COMPENSATION)
APPEALS BOARD OF THE STATE)
OF CALIFORNIA,)

Respondent.)

XYZZX SJO2,)
Respondent.)
~~Real Party in Interest.~~)

SUPREME COURT
FILED

JAN 13 2010

Frederick K. Ohlrich Clerk

Deputy

**ANSWER TO PETITION FOR REVIEW
BY THE SUPREME COURT**

Arthur L. Johnson, Esq., State Bar No. 36415
Heather A. Harper, Esq. State Bar No. 233500
BUTTS & JOHNSON
481 N. First St.
San Jose, CA 95112
Telephone: (408) 293-4818
Facsimile: (408) 293-3478
Attorneys for Real Party in Interest

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**State of California
Supreme Court
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rule 14.5**

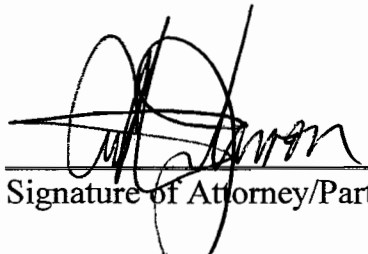
Supreme Court Case Caption:

Case Name: *JOHN C. DUNCAN, DIRECTOR of INDUSTRIAL RELATIONS, as ADMINISTRATOR of the SUBSEQUENT INJURIES BENEFITS TRUST FUND of the STATE OF CALIFORNIA v. WORKERS' COMPENSATION APPEALS BOARD; XYZZX SJ02, real party in interest*

Supreme Court Case Number: S179194

Interested entities or persons are listed below:

XYZZX SJ02	Real Party in Interest
Arthur L. Johnson Heather A. Harper	Attorneys for Real Party in Interest
Subsequent Injuries Benefits Trust Fund ("SIBTF")	Petitioner
Carol Belcher	Attorney for Petitioner



Signature of Attorney/Party Submitting Form

ARTHUR L. JOHNSON
Attorney for Applicant
Butts and Johnson
481 N. First Street
San Jose, CA 95112

State Bar No: 36415

Party Represented: XYZZX SJ02, Real party in interest

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**TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE
ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME
COURT:**

Real Party in Interest, XYZZX SJO2, hereby answers Petition for Review and responds to the Points and Authorities of Petitioner/Defendants JOHN C. DUNCAN, DIRECTOR of INDUSTRIAL RELATIONS, as ADMINISTRATOR of the SUBSEQUENT INJURIES BENEFITS TRUST FUND of the STATE OF CALIFORNIA as follows:

1. This response will be brief, as the potential issue raised by Petitioner (“double COLA”) is not now before the Court, is not ripe now for decision, and must first be addressed by the WCAB Trial Judge before coming before this Court.
2. This for the reason that the “Disposition” per the Decision of the Sixth District Court of Appeal was:

“The COLAs found in section 4659, subdivision (c) should be applied to life pensions or total permanent disability compensation as from January 1, 2004. Accordingly, the Decision of the Workers’ Compensation Appeals Board is annulled and the case is remanded to the WCAB for further proceedings.”
3. There is no reason to apply a “double COLA” when there already has been a COLA applied to the temporary disability rate, which meets the requirements of Labor Code §4659(c).

4. It seems clear that the mandates of L.C. §4659(c) will only apply to the time period when there has not already been a COLA increase applied to temporary disability. That would be for all payments after the date of injury, when temporary disability increases stop accruing under Labor Code §4453(a)(10).
5. Applicant (real party in interest XYZZX) is not contending for a “double COLA”. In fact it seems impossible to the undersigned that the WCAB Judge in this case, Judge Lauerman on remand, would have it in his mind to award a “double COLA”. This seems absolutely farfetched.
6. It appears to the undersigned attorneys, that the raising of the issue of “double COLA” is simply a “strawman” raised for the purpose of attracting the Court’s attention to a hypothetical “what if” scenario, that has not occurred. Since this matter has been remanded to the WCAB for a decision consistent with the opinion of the Sixth District Court of Appeal, there is no “issue” to appeal from as to a “double COLA” which has not yet been imposed and which is extremely unlikely to be a scenario that unfolds on remand.

WHEREFORE, Real Party in Interest respectfully prays:

1. That Petition for Writ of Review be denied on the basis that the Writ is “premature” as to any issues raised in the Writ.
2. That there is no issue “ripe” for decision, pending decision of the Workers' Compensation Appeals Board on remand from the Sixth District as to the proper determination of the COLA increase of total permanent disability in this case.

Dated: January 12, 2010

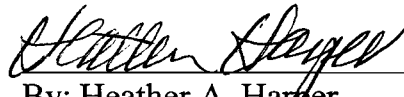
Respectfully submitted,
BUTTS AND JOHNSON



By: Arthur L. Johnson,
Attorney for Real party in interest

Dated: January 12, 2010

Respectfully submitted,
BUTTS AND JOHNSON

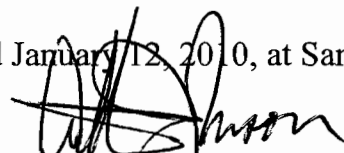


By: Heather A. Harper,
Attorney for Real party in interest

VERIFICATION

Under penalty of perjury, I declare the truth of the following:

The contents of the foregoing *ANSWER TO PETITION FOR REVIEW BY THE SUPREME COURT*, are true and correct of my own knowledge except as to matters therein stated on information and belief, and as to those matters, I believe them to be true and correct; I make this verification as attorney for XYZZXSJO2, because the facts set forth in the Answer are within my knowledge and because as attorney for XYZZXSJO2 I have greater knowledge of the facts. Executed January 12, 2010, at San Jose, California.

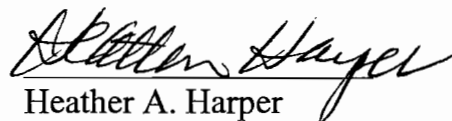


Arthur L. Johnson

VERIFICATION

Under penalty of perjury, I declare the truth of the following:

The contents of the foregoing *ANSWER TO PETITION FOR REVIEW BY THE SUPREME COURT*, are true and correct of my own knowledge except as to matters therein stated on information and belief, and as to those matters, I believe them to be true and correct; I make this verification as attorney for XYZZXSJO2, because the facts set forth in the Answer are within my knowledge and because as attorney for XYZZXSJO2 I have greater knowledge of the facts. Executed January 12, 2010, at San Jose, California.

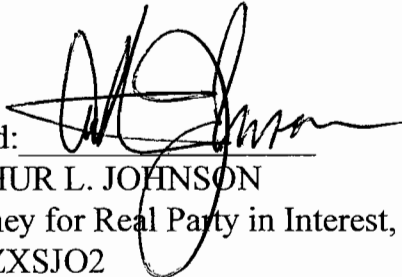


Heather A. Harper


CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed *ANSWER TO PETITION FOR REVIEW BY THE SUPREME COURT* is produced using 13-point Roman type and contains approximately 448 words, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: January 12, 2010

Signed: 
ARTHUR L. JOHNSON
Attorney for Real Party in Interest,
XYZZXSJO2

Dated: January 12, 2010

Signed: 
HEATHER A. HARPER
Attorney for Real Party in Interest,
XYZZXSJO2

Re: John C. Duncan, Director of Industrial Relations, as Administrator of the SIBTF of the State of California v. WCAB (XYZZX SJO2)

PROOF OF SERVICE BY MAIL
[C.C.P. 1013a]

I am a citizen of the United States and employed in the City of San Jose, County of Santa Clara.

I am over the age of 18 years and not a party to the within action. My business address is Butts & Johnson, 481 North First Street, San Jose, California 95112.

On January 12, 2010, I delivered the following document(s):

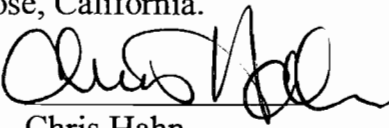
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on the interested parties to said action, by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mailbox at San Jose, California, addressed as follows:

SEE ATTACHMENT

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2010, at San Jose, California.


Chris Hahn

ATTACHED ADDRESS LIST TO PROOF OF SERVICE

**Carol Belcher, Esq.
SIBTF LEGAL
P.O. Box 420603
San Francisco, CA 94142**

**Sixth District Court of Appeal
333 West Santa Clara Street, #1060
San Jose, CA 95113**

**Workers' Compensation Appeals Board
Attn: Reconsideration Unit
P.O. Box 429459
San Francisco, CA 94142-9459
(2 copies sent)**

**Workers' Compensation Appeals Board
100 Paseo de San Antonio, Room 241
San Jose, CA 95113**

**Marc Marcus, Esq.
3031 F Street, Ste. 100
Sacramento, CA 95816-3844**

